

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
MYRTLE KIEFER, individually and as Administratrix,  
of the Estate of FRANK KIEFER

12 cv 07613 (KBF)

Plaintiff.

-against-

A.O. SMITH WATER PRODUCTS CO., et al.

Defendants

Ordered

Plaintiff to respond  
not later than

2/7/14 .

-----x  
1/31/14

1/31/14 ↗ B.Z. for  
usdj

MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT, CLEAVER-BROOKS, INC.'S RULE 45(d)(3)  
MOTION TO QUASH PLAINTIFF'S TRIAL SUBPOENA

DATED: New York, New York  
January 31, 2014

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**STATEMENT OF FACTS**

Pursuant to Fed. R. Civ. P. 45(d)(3), defendant Cleaver-Brooks, Inc. ("C-B" or "Defendant") seeks to quash a subpoena served upon an employee of Defendant which requires his attendance in New York, more than 100 miles from where he resides or is employed.

On January 29, 2014, plaintiff's counsel caused a subpoena to be personally served upon John Tornetta at 11950 West Lake Park Drive, Milwaukee, WI 53224. (Declaration of Suzanne M. Halbardier, ¶ 1 and Exhibit "A"). The return date for this subpoena is February 26, 2014, therefore this motion is timely. The subpoena seeks Mr. Tornetta's appearance at the trial of this matter. *Id.*

John Tornetta is a resident of the State of Wisconsin which is more than 100 miles away from this Courthouse. (Halbardier Declaration, ¶ 2). He is a non-party employee of C-B and is not a corporate officer of C-B. *Id.*

**ARGUMENT****POINT I****THIS SUBPOENA MUST BE QUASHED AS JOHN TORNETTA  
RESIDES MORE THAN 100 MILES FROM THIS COURT**

Fed. R. Civ. P. 45(c) states that "a subpoena may command a person to attend a trial... only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person."

In *Jaynes v. Jaynes*, 496 F.2d 9, 10, 18 Fed. R. Serv. 2d 865 (2d Cir. 1974), the Second Circuit affirmed the District Court's order and held:

...appellant seeks to have the district court subpoena parties who reside in Texas or other parts of the country more than 100 miles from any place within the Northern District of New York for the purpose of obtaining jurisdiction over them. The district court has no power to subpoena these parties and as such had no jurisdiction; accordingly, we have no choice but to affirm its judgment of dismissal. *See, e.g., Shahmoon Industries, Inc. v. Imperato*, 338 F.2d 449 (3d Cir. 1964).

*See also, Lynch v. Luckenbach S.S. Co., Inc.*, 104 F. Supp. 494, 495 (S.D.N.Y. 1952), ruling that Boston witnesses were beyond the 100 mile limit and therefore not subject to subpoena by the United States District Court for the Southern District of New York.

Mr. Tornetta resides in the State of Wisconsin. (Halbardier Declaration, ¶ 2). Although Rule 45 was amended in December 2013 regarding *service* of subpoenas, it does not change the "100 mile-rule" nor would any change apply to this lawsuit, which was filed prior to the change. *See, e.g., Moores Federal Rules Pamphlet §§ 45.7, 45.8.*

#### POINT II

#### THE TRIAL SUBPOENA MUST BE QUASHED AS JOHN TORNETTA IS A NON-PARTY EMPLOYEE AND NOT AN OFFICER OF CLEAVER BROOKS

Subpoenas served on individual employees who are not corporate officers and who reside outside the geographic scope of Rule 45 must be quashed. *Aristocrat Leisure Ltd. V. Deutsche Bank Trust Co.*, 262 F.R.D. 293, 302 (S.D.N.Y. 2009).

In *Aristocrat, supra*, the Court quashed the subpoena of the bondholders in this dispute as they were not corporate officers and resided outside the 100 mile rule.

Rule 45(c)(1)(B) permits the service of a trial subpoena on a party or a party's officer, but only "within the state where the person resides, is employed, or regularly transacts business." Here, Mr. Tornetta is an employee of C-B and not a corporate officer. (Halbardier Declaration, ¶ 2). Even so, a party or corporate officer would not be required to travel beyond their state of residence. *Id.*

### POINT III

#### THIS SUBPOENA FAILED TO INCLUDE THE MILEAGE FEE

Federal Rule of Civil Procedure 45(b)(1) states in relevant part "[s]erving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law."

Where plaintiff has failed to provide proper travel and witness fees, the subpoena should be quashed. *Brown v. Handler*, 2011 WL 3211139 (S.D.N.Y. 2011).

The Court held "the plain meaning of Rule 45... requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena." *Id. citing CF & I Steel Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 713 F.2d 494, 496 (9th Cir. 1983); *Song v. Dreamtouch, Inc.*, 2001 WL 487413 at \*7 (S.D.N.Y. May 8, 2001) ("Where no fee is tendered with the service of a subpoena requiring a witness'

atendance, the service is invalid."); *Costamar Shipping Co., Ltd. v. Kim-Sail, Ltd.*), 1995 WL 736907 at \*2 (S.D.N.Y. Dec. 12, 1995) (same).

The issuance of a \$40 check is not sufficient for the reasonably estimated mileage from Milwaukee to Manhattan. Therefore, this is an additional reason why the subpoena must be quashed

### CONCLUSION

It is respectfully requested that this Court issue an order quashing the trial subpoena served upon John Tornetta, and for such further and other relief as this Court deems just and proper.

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=====  
**MEMORANDUM OF LAW**  
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**PLEASE TAKE NOTICE**

[ ] notice of that the within is a (certified) true copy of an entry entered in the office of the clerk of the within named Court on \_\_\_\_\_

[ ] notice of that a Proposed Order of which the within is a true copy will be presented settlement before the Honorable \_\_\_\_\_ one of the judges of the within named Supreme Court, \_\_\_\_\_ County, \_\_\_\_\_ at 9:30 a.m. on the \_\_\_\_\_ day of \_\_\_\_\_.

Dated: New York, New York  
January 31, 2014

  
\_\_\_\_\_  
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